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HUESTON HENNIGAN LLP

Monday, September 9, 2019

VIA ECF

Honorable Shashi H. Kewalramani
George E. Brown, Jr. Federal Building and United States Courthouse
3470 12th Street
Riverside, CA 92501

Re: *Monster Energy Co. v. Vital Pharm., Inc.*, Case No. 5:18-cv-1882-JGB-SHK (C.D. Cal.)

Dear Honorable Shashi H. Kewalramani:

Plaintiff Monster Energy Corp. (“Monster”) submits this opening letter brief in support of its request that the Court order Defendant Vital Pharmaceuticals, Inc. (“VPX”) to sufficiently answer Monster’s Interrogatory No. 1 by providing the formula for its BANG energy drink products. Monster files this brief pursuant to the Court’s September 6, 2019 Order (ECF 128) and the September 4, 2019 telephonic conference (ECF 127).

Monster’s Interrogatory No. 1 to VPX requests: “State the formula for YOUR BANG energy drink, including the amount used of each ingredient. To the extent the formula is different for each flavor of BANG, state the formula for each flavor.” (See Exhibit¹ A at 6-9.) In response, VPX has refused to provide an unredacted formula for BANG and has only offered to provide *some* of the names of the ingredients in the formula and the amount of only *one* ingredient, caffeine. (See Exhibit B at 1.) It argues that any additional disclosure is not relevant to his action and would jeopardize VPX’s ability to protect its proprietary formula. (*Id.*)

As detailed in Monster’s Letter Brief below, VPX’s arguments are insufficient to protect against disclosure:

¹ “Exhibits” are references to the exhibits attached to this letter.

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“[C]ourts have not given trade secrets automatic and complete immunity against disclosure, but have in each case weighed their claim to privacy against the need for disclosure.” Fed. R. Civ. P. 26 advisory committee’s note (1970). District courts examine two factors to evaluate motions to compel documents that the answering party claims contain its proprietary and trade secret information.

First, courts examine whether “the information is relevant to the subject matter of the lawsuit and is necessary to prepare the case for trial.” *AECOM Energy & Const., Inc. v. Ripley*, 2018 WL 4705914, at *2-3 (C.D. Cal. Apr. 26, 2018) (internal citations omitted). *Second*, courts require “the party opposing discovery [to] show that the information is ‘a trade secret or other confidential research, development, or commercial information’ under Rule 26, and that its disclosure would be harmful to the party’s interest in the property.” *Id.* (internal citations omitted).

A. The BANG Formula is Relevant and Necessary for Monster to Prosecute Its Claims Against VPX

Pursuant to Fed. R. Civ. P. 26(b)(1), “relevant information” is information “that is relevant to any party’s claim or defense,” factoring in the needs of the case and positions of the parties. And “[t]he level of necessity that must be shown is that the information must be necessary for the movant to prepare its case for trial, which includes proving its theories and rebutting its opponent’s theories.” *Coca-Cola Bottling Co. of Shreveport, Inc. v. Coca-Cola Co.*, 107 F.R.D. 288, 293 (D. Del. 1985).

Here, a central allegation in Monster’s action is that even if creatyl-L-leucine (the supposed “Super Creatine” in BANG) were potent, there is not enough of it in BANG for it to materially impact the body. (ECF 61 ¶ 54; ECF 95 (MTD Order) at 14 (describing allegation as “specific and fully consistent”)). This allegation is a basis for three of Monster’s causes of action. (*Id.* ¶ 122 (Lanham Act false advertising); *id.* ¶ 132 (UCL violation); *id.* ¶ 141 (FAL violation).) The BANG formula is thus not only relevant, but central to proving that VPX is falsely advertising by not including enough creatyl-L-leucine in BANG for it to have a positive health effect. See, e.g., *Chavez v. Nestle USA, Inc.*, 511 F. App’x 606, 607 (9th Cir. Feb. 12, 2013) (product containing “very small amounts” of ingredient constitutes false advertising); *Yacu v. All Am. Pharm.*, 2013 WL 12324400, at *5–6 (C.D. Cal. July 24, 2013) (false statement where consumer would need to take “five times the recommended daily dosage of the Product” to achieve effects).

The preliminary injunction (“PI”) proceedings also prove why the entire BANG formula is necessary. In support of its PI motion, Monster submitted product testing evidence to show the inadequate amount of creatyl-L-leucine in BANG. (ECF 67-3 at 11.) In opposition, VPX argued that the testing was insufficient because it did not, among other things, test all different flavors of BANG, or factor in how the amounts of the other

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ingredients in BANG with creatyl-L-leucine could create a positive health effect. (ECF 96 at 16 (citing BANG study); *id.* at 17-18 (need to test of representative number of each of more than 20 flavors). The Court adopted VPX's arguments at the PI stage. (ECF 122 at 6-7 ("Nor has Monster submitted evidence that that other ingredients touted by BANG – including caffeine, CoQ10, and BCAAs – are not present in sufficient quantities to have some performance benefits.))

Without the production of the BANG formula, VPX would undoubtedly require Monster to test multiple cans of *every flavor* of BANG. And, even if Monster did so, VPX would likely still claim that Monster did not test the product correctly. In contrast, if VPX simply produced the BANG formula, this needless and expensive testing could be avoided altogether. The factfinder would know definitively how much creatyl-L-leucine and other related ingredients are in BANG and could focus on the merits of the false advertising claim. See *Coca-Cola*, 107 F.R.D. at 297-300 (ordering production of the Coca-Cola formula as necessary to litigation).

Finally, there is no risk of competitive harm from disclosure because the Court has already entered an attorneys' eyes only protective order for highly confidential information that limits disclosure solely to the outside law firms in this litigation. (ECF 125.) See *Beaver County Employers Retirement Fund v. Tile Shop Holdings, Inc.*, 2016 WL 3162218, at *5 (N.D. Cal. June 7, 2016) (holding that "attorneys' eyes only protective order[s]...alleviate any trade secret concerns.").

B. VPX Does Not Sufficiently Protect Formulas of Its Key Products

VPX also cannot meet its burden to establish that it is critical to protect the amounts of ingredients in the BANG formula from disclosure. *Nat'l Academy of Recording Arts & Sciences, Inc. v. On Point Events, LP*, 256 F.R.D. 678, 683 (C.D. Cal. 2009) (responding party must show that it has "taken reasonable steps to assure the confidentiality of th[e] information and to prevent its disclosure to third parties").

For example, despite its refusal here to provide the amounts of any ingredient other than caffeine, VPX recently publicly disclosed that its product testing revealed the amount of CoQ10 in BANG: "BANG contains 5.68 ppm (or 2.7mg) [of CoQ10]." (See Exhibit C ¶ 144.) VPX has also publicly disclosed detailed ingredient amounts – including creatyl-L-leucine, creatine, and/or BCAAs – for its other top-selling products: Redline (see Exhibit D); and BANG Master Blaster (see Exhibit E). VPX's unsupported assertion in this litigation that it is critical to protect the amounts of the same ingredients in BANG from disclosure is therefore not credible. See *Nat'l Academy*, 256 F.R.D. at 683 ("Without any declarations to support its confidentiality claim, the Court cannot simply assume defendant keeps this information confidential.").

Honorable Shashi H.
Kewalramani
Monday, September 9, 2019
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Sincerely,



Steven N. Feldman

Attachments

cc: Counsel of Record

EXHIBIT A

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14 Attorneys for Defendants
15 VITAL PHARMACEUTICALS, INC., d/b/a VPX SPORTS;
and JOHN H. OWOC, a.k.a. JACK OWOC

17 **UNITED STATES DISTRICT COURT**
18 **CENTRAL DISTRICT OF CALIFORNIA**

19 MONSTER ENERGY COMPANY, a
20 Delaware corporation,

21 Plaintiff,

22 vs.

23 VITAL PHARMACEUTICALS, INC.,
24 d/b/a VPX Sports, a Florida corporation;
and JOHN H. OWOC a.k.a. JACK OWOC,
25 an individual

26 Defendants.

27 CASE NO. 5:18-cv-01882-JGB-SHK

28 **DEFENDANT VITAL
PHARMACEUTICALS, INC.,
D/B/A VPX SPORTS' RESPONSE
TO PLAINTIFF'S SPECIAL
INTERROGATORIES, SET ONE**

Judge: Hon. Jesus G. Bernal
Courtroom 1

Complaint filed: Sept. 04, 2018

1 PROPOUNDING PARTY: Plaintiff, MONSTER ENERGY COMPANY

2 RESPONDING PARTY: Defendant, VITAL PHARMACEUTICALS,
3 INC., d/b/a VPX SPORTS

4 SET NO.: ONE

5 Defendant VITAL PHARMACEUTICALS, INC., d/b/a VPX SPORTS
6 (“Responding Party”) responds to the Special Interrogatories, Set ONE, of Plaintiff
7 MONSTER ENERGY COMPANY (“Propounding Party”) as follows:

8 1. There is no Stipulated Protective Order in place in this matter.

9 Although the parties have met and conferred regarding a Stipulated Protective
10 Order, they have yet to come to an agreement. Until a Protective Order is in place,
11 Responding Party will not produce responses, documents, data, or information that
12 is proprietary, confidential, trade secret, or otherwise harmful if disclosed.

13 2. These Interrogatories seek all documents and communications,
14 including electronically stored information (“ESI”). The parties have begun to
15 meet and confer to establish ESI/document production protocols, identify
16 custodians, and propose search terms and date ranges. To facilitate this process,
17 the parties have agreed to exchange names of potential custodians on June 25,
18 2019, along with dates of employment and a brief statement as to relevance; and to
19 propose search terms and date ranges on July 2, 2019. The parties have agreed to
20 continue their discussion regarding narrowing, scope, and burden. Responding
21 Party reserves the right to further object to Interrogatories that are unduly
22 burdensome or harassing or otherwise objectionable as discovery continues.

23 3. Discovery is ongoing. Responding Party’s responses to these
24 Interrogatories are made to the best of his present knowledge, information, and
25 belief. Said responses are at all times subject to additional or different information
26 that discovery or further investigation may disclose and, while based on the present
27 state of Responding Party’s recollection, are subject to refreshing of such
28 recollection with such additional knowledge or facts that may result from further

discovery or investigation. Responding Party reserves his right to make any use of, or to introduce at any hearing and at trial, information responsive to these Interrogatories that is discovered subsequent to the date of these responses, including, but not limited to, any information obtained and discovered herein.

5 4. Responding Party reserves all objections or other questions as to the
6 confidentiality, relevance, materiality, privilege, or admissibility as evidence, in
7 any subsequent proceeding or trial of this or any other action for any purpose
8 whatsoever, of these responses and any documents or things identified in these
9 responses.

10 5. Responding Party reserves the right to object on any ground at any
11 time to such other or supplemental discovery as Propounding Party may propound
12 involving or relating to the subject matter of these Interrogatories.

13 6. Responding Party objects to the extent these Interrogatories seek
14 information protected by the attorney-client privilege and/or attorney work product
15 privilege and/or other applicable privileged or protection. Such information shall
16 not be provided in response. Any inadvertent disclosure thereof shall not be
17 deemed a waiver.

18 7. Responding Party objects to the extent these Interrogatories seek to
19 require Responding Party to identify persons, entities, or events not known on the
20 grounds that such instructions, definitions, or Interrogatories are overbroad and
21 seek to require more of Responding Party than any obligation imposed by law,
22 subject Responding Party to unreasonable and undue annoyance, oppression,
23 burden, and expense, and seek to impose upon Responding Party an obligation to
24 investigate and discover information and materials from third parties or sources
25 that are equally accessible to Propounding Party such as, for example and without
26 limitation, research, articles, press releases, blogs, social media posts or comments,
27 product reviews, and publicly available websites.

28 8. Responding Party objects to words and excerpts of phrases inserted

1 into discovery in quotes, as those quotes are missing context, framing, meaning,
 2 and are not provided with the date, time, and location of the quote or whether the
 3 quoted language was written or stated, in a video or other recording. Responding
 4 Party objects to the use of terms defined by Propounding Party in Interrogatories
 5 and then referred to in quotes or in relation to excerpted words from quotes to the
 6 extent the words were used in a manner inconsistent with the way Propounding
 7 Party used the words in the quote.

8 9. Responding Party objects to the definition of “BANG” as vague,
 9 ambiguous, overbroad, and harassing. Propounding Party defines BANG in these
 10 Interrogatories as “the Bang Energy line of energy drink products.” Yet,
 11 Propounding Party’s First Amended Complaint (ECF 61, “FAC”) defines “BANG”
 12 both more broadly and more narrowly than as defined in the Interrogatories.
 13 Paragraphs 44, 56, 68, for example, explicitly limit Propounding Party’s claims to
 14 products with certain images of products and certain words on the package, such as
 15 those cans that contain the words “Super Creatine” (e.g., Paragraph 44; *see also*,
 16 Paragraphs 3, 4, 45-56), or containing United States Patent Number 8,445,466
 17 (e.g., Paragraphs 60-62, 68), or containing certain advertised ingredients on the
 18 label (e.g., Paragraph 56: “Each can of BANG states: ‘Power up with BANG’s
 19 potent brain & body-rocking fuel: Creatine, Caffeine, CoQ10 & BCAAs.’”; *see*
 20 *also*, Paragraph 84). Propounding Party further uses an inconsistently broad
 21 definition in footnote 1 of the FAC:

22 VPX began selling BANG to consumers in 2012. VPX currently
 23 produces and sells over a dozen flavors of BANG, including caffeine-
 24 free flavors.

25 Accordingly, for all Interrogatories that seek documents or communications
 26 related to BANG, Responding Party requests a time to meet and confer to
 27 consistently define and narrow the Request.

28 10. Responding Party further objects to the definition of “SUPER
 29 CREATINE” as “the ‘stable aqueous compositions comprising amide-protected

1 creative species' identified in the '466 PATENT" as vague and ambiguous and not
2 consistent with Propounding Party's use of the term in the FAC (e.g., Paragraph
3 44; *see also*, Paragraphs 3, 4, 45-56).

4 11. Responding Party further objects to these Interrogatories to the extent
5 they seek documents from an individual that may be in the possession, custody, or
6 control of a corporate defendant, as such discovery is duplicate, cumulative,
7 unduly burdensome, harassing, and not proportional to the needs of this case under
8 Rule 26(b)(1) to the individual. As disclosed in Defendants' Initial Disclosures,
9 Owoc is VPX's Chief Executive Officer, President, and Chief Scientific Officer, so
10 most Interrogatories propounded on him will be redundant with respect to similar
11 Interrogatories served on VPX unless personal in nature and unrelated to VPX. To
12 the extent a similar Interrogatory is propounded on corporate Defendant VPX
13 seeking these documents and the documents are not personal in nature to
14 individual Defendant Owoc, these Interrogatories are duplicative and any non-
15 privileged, responsive documents in the possession, custody, and control of VPX
16 will be produced by VPX, withheld by VPX, or subject to VPX's objections,
17 including but not limited to privilege. These documents will not be redundantly
18 produced by the individual Defendant Owoc. In addition to those general and
19 specific objections raised by Responding Party, Responding Party expressly
20 incorporates by reference all general and specific Objections raised by VPX in
21 response to each and every duplicative Request.

22 12. Responding Party further objects to these Interrogatories to the extent
23 they seek information and documents from a corporate defendant that may be in
24 the possession, custody, or control of third parties or another defendant, as such
25 discovery is duplicate, cumulative, unduly burdensome, harassing, and not
26 proportional to the needs of this case under Rule 26(b)(1) to the individual. As
27 disclosed in Defendants' Initial Disclosures, Owoc is VPX's Chief Executive
28 Officer, President, and Chief Scientific Officer, so most discovery Requests

1 propounded on him will be redundant with respect to similar Requests served on
2 VPX unless personal in nature and unrelated to VPX. To the extent a redundant
3 Interrogatory is propounded on corporate Defendant VPX seeking information and
4 documents and the information and documents are personal in nature to individual
5 Defendant Owoc, this Interrogatory is duplicative and any non-privileged,
6 responsive documents in the possession, custody, and control of Owoc will be
7 produced by Owoc, withheld by Owoc, or subject to Owoc's objections, including
8 but not limited to privilege. The information and documents will not be
9 redundantly produced by the corporate defendant VPX. In addition to those
10 general and specific objections raised by Responding Party, Responding Party
11 expressly incorporates by reference all general and specific Objections raised by
12 Owoc in response to each and every duplicative Request.

13 **SPECIFIC RESPONSES**

14 **TO SPECIAL INTERROGATORIES**

15 Without waiving or rebutting in any manner any of the foregoing general
16 objections, but rather incorporating them into each of the following responses to
17 the extent applicable, Responding Party responds to Propounding Party's special
18 interrogatories as follows:

19 **SPECIAL INTERROGATORY NO. 1:**

20 State the formula for YOUR BANG energy drink, including the amount
21 used of each ingredient. To the extent the formula is different for each flavor of
22 BANG, state the formula for each flavor.

23 **RESPONSE TO INTERROGATORY NO. 1:**

24 Responding Party objects to this Interrogatory to the extent it seeks
25 privileged attorney client communications or work product. Responding Party
26 further objects to this Interrogatory on the basis that it seeks information that is
27 confidential and proprietary in nature and, as such, will not be produced until a
28 Protective Order is in place. Responding Party objects to this Interrogatory as

1 seeking proprietary information regarding trade secrets, including ingredients,
2 recipes, formulations, formulae, which would be extremely detrimental to
3 Defendant if disseminated or distributed publicly or if provided to Responding
4 Party's competitors or potential competitors. Responding Party further objects to
5 this Interrogatory as vague as to scope and time and seeking irrelevant information
6 and documents. Responding Party further objects to this Interrogatory as unduly
7 burdensome, harassing, and not proportional to the needs of this case under Rule
8 26(b)(1). Responding Party objects to this Interrogatory as vague and ambiguous
9 as to the scope and time. Responding Party objects to the definition of "BANG" as
10 vague, ambiguous, overbroad, and harassing. Defendant objects to this
11 Interrogatory as vague and ambiguous with respect to the undefined terms
12 "formula," "amount," "ingredient," and "flavor." Responding Party further objects
13 to this Interrogatory to the extent this Interrogatory seeks information subject to
14 expert analysis or opinion. To the extent information will be analyzed by an
15 expert, such information may be provided in an expert's report as set forth
16 according to the Court's schedule. Further, this Interrogatory appears to be
17 duplicative of document requests, including specifically request no. 4 which seeks
18 "All DOCUMENTS and COMMUNICATIONS relating to YOUR studies,
19 research, and tests of BANG products, including but not limited to:

- 20 a. The amount of creatine in BANG products;
- 21 b. The amount of SUPER CREATINE in BANG products;
- 22 c. The amount of creatine in SUPER CREATINE;
- 23 d. The incremental effect of including additional SUPER CREATINE in
24 BANG products;
- 25 e. The contents of BANG products;
- 26 f. Comparisons between BANG products and products manufactured or
27 sold by MONSTER;
- 28 g. The health impacts of creatyl-L-leucine; and

h. Discussions or analyses relating to creatinine.”

Further, this Interrogatory is duplicative of request no. 50 which seeks “All DOCUMENTS and COMMUNICATIONS relating to the formulation or changes to the formulation of BANG products.” Responding Party incorporates by reference all objections made in response to Request for Documents, including but not limited to Nos. 4 and 50.

Subject to the foregoing general and specific objections, Defendant responds as follows:

It is undisputed that certain BANG products contain a form of creatine, creatyl-L-leucine, which combines creatine and an amino acid, leucine. Creatyl-L-leucine in certain BANG products is branded under the trademark SUPER CREATINE. Responding Party also incorporates by reference the declaration by Dr. Li in support of Defendants' Opposition to Monster's Motion for a Preliminary Injunction (ECF 100 and exhibits 100-1 through 100-3). Responding Party will not produce its proprietary and trade secret formulas to a competitor, Monster, who just introduced a knock-out drink, REIGN, to compete against Responding Party's BANG® energy drink. Responding Party may supplement this response to provide certain, redacted information sought by this Interrogatory that is relevant to the question of Creatyl-L-Leucine in certain BANG® drinks, but Responding Party will not produce its proprietary formulas and lists of amounts for all ingredients in all BANG® drinks. Responding Party further objects to the extent the relevant information sought by this Interrogatory is duplicative of other Interrogatories (e.g., No. 2) and requests for production of documents. Pursuant to Federal Rule of Civil Procedure 33(d), Defendant reserves the right to produce business records in this action from which the answer to the reasonable scope of this Interrogatory may be ascertained. The answer to this Interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing Responding Party business records (including electronically stored information), and the burden of

1 deriving or ascertaining the answer will be substantially the same for either party.
2 Responding Party will meet and confer with Propounding Party to narrow the
3 scope of this Request so that the non-privileged information in Responding Party's
4 possession, custody, or control sufficient to respond to this Request is
5 proportionate to the needs of this case and will be produced subject to a Protective
6 Order. Specifically, Responding Party will continue to meet and confer with
7 Propounding Party regarding ESI protocols, custodians, search terms, and date
8 ranges.

9 **SPECIAL INTERROGATORY NO. 2:**

10 If YOU contend that BANG contains creatine, state all bases for YOUR
11 contention.

12 **RESPONSE TO INTERROGATORY NO. 2:**

13 Responding Party objects to the extent this Interrogatory is duplicative of
14 Interrogatory No. 1. Responding Party objects to this Interrogatory to the extent it
15 seeks privileged attorney client communications or work product. Responding
16 Party further objects to this Interrogatory on the basis that it seeks information that
17 is confidential and proprietary in nature and, as such, will not be produced until a
18 Protective Order is in place. Responding Party objects to this Interrogatory as
19 seeking proprietary information regarding trade secrets, including ingredients,
20 recipes, formulations, formulae, which would be extremely detrimental to
21 Defendant if disseminated or distributed publicly or if provided to Responding
22 Party's competitors or potential competitors. Responding Party further objects to
23 this Interrogatory as vague as to scope and time and seeking irrelevant information
24 and documents. Responding Party further objects to this Interrogatory as unduly
25 burdensome, harassing, and not proportional to the needs of this case under Rule
26 26(b)(1). Responding Party objects to this Interrogatory as vague and ambiguous
27 as to the scope and time. Responding Party objects to the definition of "BANG" as
28 vague, ambiguous, overbroad, and harassing. Defendant objects to this

1 Interrogatory is vague and ambiguous with respect to the undefined terms
2 “contains” and “creatine.” Responding Party further objects to this Interrogatory
3 to the extent this Interrogatory seeks information subject to expert analysis or
4 opinion. To the extent information will be analyzed by an expert, such information
5 may be provided in an expert’s report as set forth according to the Court’s
6 schedule. Further, this Interrogatory appears to be duplicative of document
7 requests, including specifically request no. 4 which seeks “All DOCUMENTS and
8 COMMUNICATIONS relating to YOUR studies, research, and tests of BANG
9 products, including but not limited to:

- 10 a. The amount of creatine in BANG products;
- 11 b. The amount of SUPER CREATINE in BANG products;
- 12 c. The amount of creatine in SUPER CREATINE;
- 13 d. The incremental effect of including additional SUPER CREATINE in
14 BANG products;
- 15 e. The contents of BANG products;
- 16 f. Comparisons between BANG products and products manufactured or
17 sold by MONSTER;
- 18 g. The health impacts of creatyl-L-leucine; and
- 19 h. Discussions or analyses relating to creatinine.”

20 Further, this Interrogatory is duplicative of request no. 50 which seeks “All
21 DOCUMENTS and COMMUNICATIONS relating to the formulation or changes
22 to the formulation of BANG products.” Responding Party incorporates by
23 reference all objections made in response to Request for Documents, including but
24 not limited to Nos. 4 and 50. Responding Party further objects to this Interrogatory
25 as seeking information that calls for a legal conclusion.

26 Subject to the foregoing general and specific objections, Defendant responds
27 as follows:

28 It is undisputed that many forms of creatine exist in the marketplace,

1 including formulations combining creatine with amino acids. It is also undisputed
2 that certain BANG products contain a form of creatine, creatyl-L-leucine, which
3 combines creatine with the amino acid, leucine. Creatyl-L-leucine in certain
4 BANG products is branded under the trademark SUPER CREATINE. Responding
5 Party also incorporates by reference the declaration by Dr. Li in support of
6 Defendants' Opposition to Monster's Motion for a Preliminary Injunction (ECF
7 100 and exhibits 100-1 through 100-3). Responding Party also incorporates by
8 reference exhibits to the Declaration of Steven Feldman in support of Monster's
9 Motion for a Preliminary Injunction (ECF 69, Exhibits 24 and 25, Thomas W.
10 Buford, et al., International Society of Sports Nutrition position stand: creatine
11 supplementation and exercise, J. Int. Soc. Sports. Nutr., Aug. 2007; see also Robert
12 Cooper, et al., Creatine supplementation with specific view to exercise/sports
13 performance: an update, J. Int. Soc. Sports. Nutr., July 2012, respectively).

14 This Interrogatory appears to seek expert testimony, which is improper prior
15 to the deadline for expert reports. Expert reports and testimony will be served
16 according to the Federal Rules and the Court's schedule. This Interrogatory
17 appears to seek documents from third parties: "all bases for YOUR contention."
18 Propounding Party will not produce "all" bases or DOCUMENTS in response to
19 this Interrogatory. Pursuant to Federal Rule of Civil Procedure 33(d), Defendant
20 reserves the right to produce business records in this action from which the answer
21 to the reasonable scope of this Interrogatory may be ascertained. The answer to this
22 Interrogatory may be determined by examining, auditing, compiling, abstracting,
23 or summarizing Responding Party business records (including electronically stored
24 information), and the burden of deriving or ascertaining the answer will be
25 substantially the same for either party. Responding Party will meet and confer
26 with Propounding Party to narrow the scope of this Request so that the non-
27 privileged information in Responding Party's possession, custody, or control
28 sufficient to respond to this Request is proportionate to the needs of this case and

1 will be produced subject to a Protective Order. Specifically, Responding Party will
2 continue to meet and confer with Propounding Party regarding ESI protocols,
3 custodians, search terms, and date ranges.

4 **SPECIAL INTERROGATORY NO. 3:**

5 If YOU contend that BANG contains creatine, identify all publications,
6 research papers, and DOCUMENTS supporting YOUR claim, and *how* that source
7 supports YOUR claim that BANG contains creatine.

8 **RESPONSE TO INTERROGATORY NO. 3:**

9 Responding Party objects to this Interrogatory to the extent it is duplicative
10 of Interrogatory No. 2. Responding Party objects to this Interrogatory to the extent
11 it seeks privileged attorney client communications or work product. Responding
12 Party further objects to this Interrogatory on the basis that it seeks information that
13 is confidential and proprietary in nature and, as such, will not be produced until a
14 Protective Order is in place. Responding Party objects to this Interrogatory as
15 seeking proprietary information regarding trade secrets, including ingredients,
16 recipes, formulations, formulae, which would be extremely detrimental to
17 Defendant if disseminated or distributed publicly or if provided to Responding
18 Party's competitors or potential competitors. Responding Party further objects to
19 this Interrogatory as vague as to scope and time and seeking irrelevant information
20 and documents. Responding Party further objects to this Interrogatory as unduly
21 burdensome, harassing, and not proportional to the needs of this case under Rule
22 26(b)(1). Responding Party objects to this Interrogatory as vague and ambiguous
23 as to the scope and time. Responding Party objects to the definition of "BANG" as
24 vague, ambiguous, overbroad, and harassing. Defendant objects to this
25 Interrogatory as vague and ambiguous with respect to the undefined terms
26 "contains," "creatine," "that source," and "supports." Responding Party further
27 objects to this Interrogatory to the extent this Interrogatory seeks information
28 subject to expert analysis or opinion. To the extent information will be analyzed

1 by an expert, such information may be provided in an expert's report as set forth
2 according to the Court's schedule. Further, this Interrogatory appears to be
3 duplicative of document requests, including specifically request no. 4 which seeks
4 "All DOCUMENTS and COMMUNICATIONS relating to YOUR studies,
5 research, and tests of BANG products, including but not limited to:

- 6 a. The amount of creatine in BANG products;
- 7 b. The amount of SUPER CREATINE in BANG products;
- 8 c. The amount of creatine in SUPER CREATINE;
- 9 d. The incremental effect of including additional SUPER CREATINE in
10 BANG products;
- 11 e. The contents of BANG products;
- 12 f. Comparisons between BANG products and products manufactured or
13 sold by MONSTER;
- 14 g. The health impacts of creatyl-L-leucine; and
- 15 h. Discussions or analyses relating to creatinine."

16 Further, this Interrogatory is duplicative of request no. 50 which seeks "All
17 DOCUMENTS and COMMUNICATIONS relating to the formulation or changes
18 to the formulation of BANG products." Responding Party incorporates by
19 reference all objections made in response to Request for Documents, including but
20 not limited to Nos. 4 and 50. Responding Party further objects to the extent this
21 request seeks information from third-parties. Responding Party further objects to
22 this Interrogatory as seeking information that calls for a legal conclusion.

23 Subject to the foregoing general and specific objections, Defendant responds
24 as follows:

25 It is undisputed that many forms of creatine exist in the marketplace,
26 including formulations combining creatine with amino acids. It is also undisputed
27 that certain BANG products contain a form of creatine, creatyl-L-leucine, which
28 combines creatine with the amino acid, leucine. Creatyl-L-leucine in certain

1 BANG products is branded under the trademark SUPER CREATINE. Responding
2 Party also incorporates by reference the declaration by Dr. Li in support of
3 Defendants' Opposition to Monster's Motion for a Preliminary Injunction (ECF
4 100 and exhibits 100-1 through 100-3). Responding Party also incorporates by
5 reference exhibits to the Declaration of Steven Feldman in support of Monster's
6 Motion for a Preliminary Injunction (ECF 69, Exhibits 24 and 25, Thomas W.
7 Buford, et al., International Society of Sports Nutrition position stand: creatine
8 supplementation and exercise, J. Int. Soc. Sports. Nutr., Aug. 2007; see also Robert
9 Cooper, et al., Creatine supplementation with specific view to exercise/sports
10 performance: an update, J. Int. Soc. Sports. Nutr., July 2012, respectively).

11 This Interrogatory appears to seek expert testimony, which is improper prior
12 to the deadline for expert reports. Expert reports and testimony will be served
13 according to the Federal Rules and the Court's schedule. This Interrogatory
14 specifically seeks documents from third parties: "all publications, research papers,
15 and DOCUMENTS supporting YOUR claim." Propounding Party will not
16 produce "all" DOCUMENTS in response to this Interrogatory. Pursuant to Federal
17 Rule of Civil Procedure 33(d), Defendant reserves the right to produce business
18 records in this action from which the answer to the reasonable scope of this
19 Interrogatory may be ascertained. The answer to this Interrogatory may be
20 determined by examining, auditing, compiling, abstracting, or summarizing
21 Responding Party business records (including electronically stored information),
22 and the burden of deriving or ascertaining the answer will be substantially the same
23 for either party. Responding Party will meet and confer with Propounding Party to
24 narrow the scope of this Request so that the non-privileged information in
25 Responding Party's possession, custody, or control sufficient to respond to this
26 Request is proportionate to the needs of this case and will be produced subject to a
27 Protective Order. Specifically, Responding Party will continue to meet and confer
28 with Propounding Party regarding ESI protocols, custodians, search terms, and

1 date ranges.

2 **SPECIAL INTERROGATORY NO. 4:**

3 If YOU contend that the “Super Creatine” in BANG creates positive health
4 effects for drinkers, identify all publications, research papers, and DOCUMENTS
5 supporting YOUR claim, and how that source supports YOUR claim that the
6 “Super Creatine” in BANG creates positive health effects for drinkers.

7 **RESPONSE TO INTERROGATORY NO. 4:**

8 Responding Party objects to this Interrogatory to the extent it seeks
9 privileged attorney client communications or work product. Responding Party
10 further objects to this Interrogatory on the basis that it seeks information that is
11 confidential and proprietary in nature and, as such, will not be produced until a
12 Protective Order is in place. Responding Party objects to this Interrogatory as
13 seeking proprietary information regarding trade secrets, including ingredients,
14 recipes, formulations, formulae, which would be extremely detrimental to
15 Defendant if disseminated or distributed publicly or if provided to Responding
16 Party’s competitors or potential competitors. Responding Party further objects to
17 this Interrogatory as vague as to scope and time and seeking irrelevant information
18 and documents. Responding Party further objects to this Interrogatory as unduly
19 burdensome, harassing, and not proportional to the needs of this case under Rule
20 26(b)(1). Responding Party objects to this Interrogatory as vague and ambiguous
21 as to the scope and time. Responding Party objects to the definitions of “BANG”
22 and “SUPER CREATINE” as vague, ambiguous, overbroad, and harassing.
23 Defendant objects to this Interrogatory as vague and ambiguous with respect to the
24 undefined terms “supporting,” “YOUR claim,” “positive health effects,” “health
25 effects.” Responding Party further objects to this Interrogatory to the extent this
26 Interrogatory seeks information subject to expert analysis or opinion. To the extent
27 information will be analyzed by an expert, such information may be provided in an
28 expert’s report as set forth according to the Court’s schedule. Further, this

1 Interrogatory appears to be duplicative of document requests, including
2 specifically request no. 4 which seeks “All DOCUMENTS and
3 COMMUNICATIONS relating to YOUR studies, research, and tests of BANG
4 products, including but not limited to:

- 5 a. The amount of creatine in BANG products;
- 6 b. The amount of SUPER CREATINE in BANG products;
- 7 c. The amount of creatine in SUPER CREATINE;
- 8 d. The incremental effect of including additional SUPER CREATINE in
9 BANG products;
- 10 e. The contents of BANG products;
- 11 f. Comparisons between BANG products and products manufactured or
12 sold by MONSTER;
- 13 g. The health impacts of creatyl-L-leucine; and
- 14 h. Discussions or analyses relating to creatinine.”

15 Further, this Interrogatory is duplicative of request no. 50 which seeks “All
16 DOCUMENTS and COMMUNICATIONS relating to the formulation or changes
17 to the formulation of BANG products.” Responding Party incorporates by
18 reference all objections made in response to Request for Documents, including but
19 not limited to Nos. 4, 36, 37, 48, and 50. Responding Party further objects to the
20 extent this request seeks information from third-parties. Responding Party further
21 objects to this Interrogatory as seeking information that calls for a legal conclusion.

22 Subject to the foregoing general and specific objections, Defendant responds
23 as follows:

24 Even though Responding Party is responding to this Interrogatory,
25 Responding Party does not have the burden of proof as to the topic raised in this
26 Interrogatory. *See e.g.*, Order Denying Monster’s Motion for a Preliminary
27 Injunction, dated June 6, 2019, ECF 122, page 6. For example, Propounding Party
28 has the burden of demonstrating that Creatyl-L-Leucine does not provide the

1 benefits of creatine. This Interrogatory appears to seek expert testimony, which is
2 improper prior to the deadline for expert reports. Expert reports and testimony will
3 be served according to the Federal Rules and the Court's schedule. Responding
4 Party reserves the right to provide a rebuttal to Propounding Party's position after
5 Propounding Party provides its position, evidence, expert reports, or testimony.
6 Responding Party incorporates by reference the declaration by Dr. Li in support of
7 Defendants' Opposition to Monster's Motion for Preliminary Injunction, including
8 Exhibit L3 (ECF 100 and exhibits 100-1 through 100-3). Exhibit L3 to Dr. Li's
9 Declaration is a true and correct copy of the poster presentation for this latest study
10 of BANG®. VPX sponsored a double-blind, placebo-controlled, crossover trial
11 study of BANG®, performed by Nova Southeastern University, entitled "The
12 Effects of BANG® Energy on Psychomotor Vigilance," by Christopher Horn,
13 Madaline Kenyon, Cassandra Carson, Anya Ellerbrock, Lia Jiannine, Tobin Silver,
14 Corey Peacock, Jaime Tartar, and Jose Antonio. In conclusion, the BANG®
15 energy drink resulted in a significantly lower (i.e., faster) (p<0.05) psychomotor
16 vigilance mean reaction time versus the placebo as well as fewer lapses. Creatyl-L-
17 leucine in certain BANG products is branded under the trademark SUPER
18 CREATINE.

19 This Interrogatory specifically seeks documents from third parties: "all
20 publications, research papers, and DOCUMENTS supporting YOUR claim."
21 Propounding Party will not produce "all" DOCUMENTS in response to this
22 Interrogatory. Pursuant to Federal Rule of Civil Procedure 33(d), Defendant
23 reserves the right to produce business records in this action from which the answer
24 to the reasonable scope of this Interrogatory may be ascertained. The answer to this
25 Interrogatory may be determined by examining, auditing, compiling, abstracting,
26 or summarizing Responding Party business records (including electronically stored
27 information), and the burden of deriving or ascertaining the answer will be
28 substantially the same for either party. Responding Party will meet and confer

1 with Propounding Party to narrow the scope of this Request so that the non-
2 privileged information in Responding Party's possession, custody, or control
3 sufficient to respond to this Request is proportionate to the needs of this case and
4 will be produced subject to a Protective Order. Specifically, Responding Party will
5 continue to meet and confer with Propounding Party regarding ESI protocols,
6 custodians, search terms, and date ranges.

7 | **SPECIAL INTERROGATORY NO. 5:**

8 State the locations and custodians of all DOCUMENTS and nonwritten
9 files—including video and audio files—relating to the allegations and claims in
10 Monster’s First Amended Complaint (ECF 61).

11 | **RESPONSE TO INTERROGATORY NO. 5:**

12 Responding Party objects to this Interrogatory to the extent it seeks
13 privileged attorney client communications or work product. Responding Party
14 further objects to this Interrogatory on the basis that it seeks information that is
15 confidential and proprietary in nature and, as such, will not be produced until a
16 Protective Order is in place. Responding Party further objects to this Interrogatory
17 as vague as to scope and time and seeking irrelevant information and documents.
18 Responding Party further objects to this Interrogatory as unduly burdensome,
19 harassing, and not proportional to the needs of this case under Rule 26(b)(1).
20 Responding Party objects to this Interrogatory as vague as to scope and time and
21 seeking irrelevant information and documents. Responding Party further objects to
22 this Interrogatory as unduly burdensome, harassing, and not proportional to the
23 needs of this case under Rule 26(b)(1). Responding Party will not go through the
24 First Amended Complaint (“FAC”) and object to each term or undefined term
25 which is vague, ambiguous, or otherwise objectionable, as that would be harassing
26 and burdensome. Responding Party objects to the extent this Request seeks
27 information from Propounding Party, third parties, or publicly available
28 information. This Interrogatory specifically seeks documents from third parties:

1 “all DOCUMENTS and nonwritten files—including video and audio files—
2 relating to the allegations and claims.” Propounding Party will not produce “all”
3 DOCUMENTS in response to this Interrogatory. Responding Party avers that
4 Propounding Party has information “relating” to the allegations and claims
5 Propounding Party made in the FAC. In order to respond to this Interrogatory,
6 Responding Party would have to evaluate over 200 paragraphs of allegations and
7 claims, four of which were dismissed. Responding Party objects to this
8 Interrogatory as seeking information with respect to claims that were dismissed.
9 Plaintiff’s Fourth Cause of Action for Trade Libel (Paragraph Nos. 148 through
10 151), Seventh Cause of Action for Conversion (Paragraph Nos. 166 through 170),
11 Eighth Cause of Action for violation of California Penal Code section 496
12 (Paragraph Nos. 171 through 177), and Ninth Cause of Action for False Patent
13 Marking (Paragraph Nos. 178 through 183) were each asserted in the FAC and
14 subsequently dismissed pursuant to this Court’s May 20, 2019 Order on
15 Defendants’ Motion to Dismiss for Failure to State a Claim. (ECF No. 95 (Order
16 dismissing four of Plaintiff’s causes of action in the FAC).) Those paragraphs
17 148-151, 166-183 repeat and re-allege information alleged in other paragraphs in
18 the FAC. Plaintiff did not file an amended complaint in response to the Order
19 dismissing these claims in the FAC. Responding Party incorporates by reference
20 its Answer filed on July 2, 2019 (ECF 123) and any Answer(s) filed with the Court
21 subsequent to the date of service of this Interrogatory response. Further,
22 Responding Party incorporates by reference where Responding Party stated it
23 denied an allegation or lacked knowledge or information sufficient to form a belief
24 as to allegations in the FAC. Responding Party will not provide a list of all current
25 and former employees who may have some knowledge of some allegation made in
26 a FAC that contains over 200 paragraphs of allegations, many of which refer to
27 advertisements or statements allegedly made publicly. Responding Party objects to
28 the extent this Interrogatory is duplicative of requests for production of documents

1 served already or yet to be served. Responding Party incorporates by reference all
2 objections made in response to Requests for Production of Documents served on
3 Owoc and VPX. Responding Party will not repeat in this response all the
4 objections to the Requests for Production of Documents already served on Owoc
5 (set one, Nos. 1-85) and VPX (set one, Nos. 1-85) or that will be served in the
6 future. This Interrogatory seeks information regarding documents and nonwritten
7 files that may be within the scope of electronic requests for emails, and the Parties
8 are meeting and conferring regarding document production, including custodians,
9 search terms, and objections. Responding Party will not produce documents that
10 are publicly available in response to this Request. Responding Party has no
11 obligation to investigate and discover information and materials from third parties
12 or sources that are equally accessible to Propounding Party such as, for example
13 and without limitation, posted videos. Responding Party further objects to this
14 Interrogatory as seeking information that calls for expert opinion or a legal
15 conclusion.

16 Subject to the foregoing general and specific objections, Responding Party
17 responds as follows:

18 To the extent this Interrogatory seeks information consistent with the Initial
19 Disclosures, VPX has already responded to this Interrogatory in a manner
20 consistent with its obligations and subject to supplementing. Responding Party
21 incorporates by reference the Initial Disclosures served by the Parties in this case,
22 which listed possible custodians and locations of documents, as well as any
23 subsequent supplemental disclosures. Defendants' Initial Disclosures stated, in
24 part: "These documents are located at one or more offices of Defendants or their
25 counsel, or are in the possession, custody, or control of Plaintiff or Plaintiff's
26 counsel or third parties. Defendants note that some of these documents and things
27 are publicly available, for instance through the USPTO website, through publicly
28 available websites, including VPX's websites, Defendants' social media, third

1 parties' websites/social media, or publicly available for purchase such as the
2 products at issue. Defendants reserve the right to rely on any documents produced
3 by Plaintiff, Defendants, or any third party during the course of this action.”
4 Monster’s Initial Disclosures stated: “To the extent relevant documents consist of
5 electronically stored information (“ESI”), such ESI resides on Monster’s computer
6 systems and equipment. To the extent relevant documents consist of paper records
7 and tangible things, they are in the custody of various Monster employees. Monster
8 continues to search for additional documents that it may use to support its claims
9 or defenses and, without in any way obligating itself to do so, expressly reserves
10 the right to supplement, modify, and/or amend its production with such additional
11 documents or information.”

12 Responding Party also incorporates by reference the list of possible
13 custodians exchanged between counsel for Responding Party and Monster during
14 meet and confer correspondence, including via email on June 25, 2019. In that
15 communication, the following list of 15 potential VPX custodians were referenced
16 for furthering the meet and confer process on ESI/emails, with the right reserved to
17 revise this list as discovery continues. The topics listed are to reflect that these
18 employees may have responsive documents for certain topics, but there is no
19 guarantee that they are a custodian of non-duplicative, relevant, responsive, non-
20 privileged records, particularly for forthcoming key word search terms provided
21 during the date range of employment for any of the specific categories listed. The
22 information below contains the name, title, potential relevance as a custodian (i.e.,
23 they may have documents relating to topics including those listed below), and date
24 range of employment. The reference to “present” is the date the email was sent,
25 June 25, 2019.

26 1. Brent Boucaud, VPX - Accounting Consultant; Financial matters
27 related to VPX’s product development, testing, manufacturing,
28 distribution, marketing, media, and sales. 12/17/2013 - 11/22/2017

1 (currently an outside consultant).

2 2. John H. Owoc, VPX - Chief Executive Officer, President and Chief
3 Scientific Officer; The claims against Defendants and defenses of
4 Defendants, Defendants' company information, and the products at
5 issue. 8/1/1996 – Present.

6 3. Alejandra Gonzalez, VPX – former Customer Service Representative;
7 Marketing, advertising, promotion, social media. From 09/04/2018 to
8 06/17/2019.

9 4. Sury Rodriguez, VPX - Director of Finance; Financial matters related
10 to VPX's product development, testing, manufacturing, distribution,
11 marketing, media, and sales. 06/04/2018 – Present.

12 5. Meg Liz Owoc, VPX - Director of Marketing; Marketing, advertising,
13 promotion, social media. 11/02/2010 – Present.

14 6. Gene Bukovi, VPX - Executive Vice President of Sales; Marketing,
15 advertising, promotion, distribution, sales. VPX's dealings with
16 distributors. 11/20/2009 – Present.

17 7. Paul Borrelli, VPX - Facilities Manager; Product development,
18 testing, quality control, and manufacturing. 10/09/2000 – Present.

19 8. Peter Cinieri, VPX - former Chief Financial Officer, and current
20 outside consultant for VPX. Financial matters related to VPX's
21 product development, testing, manufacturing, distribution, marketing,
22 media, and sales. 11/12/2013 - 7/31/2015.

23 9. Chantal Salas, VPX - former Marketing Coordinator; Marketing of
24 VPX's sports supplements and energy drink products, including the
25 BANG® products at issue in the FAC. 1/16/2017 - 8/15/2018.

26 10. Nora Higuera, VPX - former R&D Senior Food Scientist; Product
27 development, testing, and manufacturing of VPX's products.
28 2/11/2008 - 10/31/2017.

1 11. Marc J. Kesten, Esq., VPX - General Counsel; The claims against
2 Defendants and defenses of Defendants. 2/24/2014 – Present.
3 12. Elina Sanchez, VPX - Raw Materials Buyer; Product development,
4 quality control, and ingredients. 5/22/2017 – Present.
5 13. Dr. Liangxi Li, VPX - Research & Development Manager; Product
6 research and development, testing, quality control, and ingredients.
7 10/03/2011 – Present.
8 14. Robbie Durand, VPX - Vice President of Media; Marketing,
9 advertising, promotion, and university testing of BANG® products
10 and similar products. 12/12/2016 – Present.
11 15. Sam Wilson, VPX – Executive Vice President of Sales &
12 Distribution; Marketing, advertising, promotion, distribution, sales.
13 VPX’s dealings with distributors. 04/09/2018 – Present.

14 On July 2, 2019, Monster’s counsel continued the meet and confer process
15 by providing additional names, specifically Stephen Cohen; Pat McMahon; and
16 Richard Laitinen. Discovery is ongoing and meet and confer efforts are
17 continuing. Responding Party will not separately produce any documents
18 responsive to this Interrogatory, as this Interrogatory does not seek documents but
19 rather asks where those documents are located. However, Responding Party will
20 continue to meet and confer with Plaintiff to narrow the scope of this Request so
21 that the non-privileged information in Responding Party’s possession, custody, and
22 control sufficient to respond to this Request is proportionate to the needs of this
23 case and will be produced subject to a Protective Order. Specifically, Responding
24 Party will continue to meet and confer with Propounding Party regarding ESI
25 protocols, custodians, search terms, and date ranges.

1 Dated: July 10, 2019

GORDON REES SCULLY
MANSUKHANI LLP

2

3

By: /s/ Timothy K. Branson

4

M.D. Scully
Timothy K. Branson
Sean P. Flynn
Holly L.K. Heffner
Michael D. Kanach
Peter G. Siachos
Attorneys for Defendants
VITAL PHARMACEUTICALS, INC.,
d/b/a VPX Sports;
JOHN H. OWOC, a.k.a. JACK OWOC

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VERIFICATION

I, Marc J. Kesten, Esq., declare:

I am the General Counsel of VITAL PHARMACEUTICALS, INC., d/b/a VPX SPORTS, a corporation organized and existing under the laws of Florida, which is the Defendant in the above-entitled action, and I have been authorized to make this verification on its behalf.

I have read the foregoing **DEFENDANT VITAL PHARMACEUTICALS, INC., D/B/A VPX SPORTS' RESPONSE TO PLAINTIFF'S SPECIAL INTERROGATORIES, SET ONE** on file herein and know the contents thereof. To the extent I have personal knowledge of the matters set forth therein, the same are true and correct. Insofar as said matters are a composite of the information of many individuals, I do not have personal knowledge concerning all of the information contained in said Response, but I am informed and believe that the information set forth therein for which I lack personal knowledge is true and correct.

I declare under penalty of perjury under the laws of the United States of America the foregoing is true and correct.

Executed at Weston, Florida, on July 10, 2019.

John G. Johnson

CERTIFICATE OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is: Gordon Rees Scully Mansukhani, 275 Battery Street, Suite 2000, San Francisco, CA 94111, my electronic mail address is mkanach@grsm.com. On July 10, 2019, I served the foregoing document(s) entitled: **DEFENDANT VITAL PHARMACEUTICALS, INC., D/B/A VPX SPORTS' RESPONSE TO PLAINTIFF'S SPECIAL INTERROGATORIES, SET ONE** as follows:

BY ELECTRONIC MAIL by transmitting via electronic mail the document(s) listed above to the address(es) listed below on this date pursuant to FRCP 5(b)(2)(E).

Counsel for MONSTER ENERGY: **Counsel for MONSTER ENERGY:**

John C. Hueston
Moez Kaba
Steven N. Feldman
Joseph A. Reiter
Michael H. Todisco
Sourabh Mishra
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I declare under penalty of perjury under the laws of the United States of America that the above is true and correct and that I am employed in the office of a member of the bar of this court at whose direction this service was made.

Executed on July 10, 2019 at San Mateo, California.

/s/ Michael D. Kanach

EXHIBIT B

Sourabh Mishra

From: Steven N. Feldman
Sent: Thursday, August 29, 2019 8:28 PM
To: Michael Kanach
Cc: Sourabh Mishra; hheffner@grsm.com; Michael Todisco; tbranson@grsm.com
Subject: Re: [Monster/VPX] Summary of 8/27 Meet and Confer

Michael,

The Court's rule requires the moving party to e-mail chambers. It is thus your obligation to send that request, not Monster's. And since Monster's responses on the alleged other formulas you are requesting are not even yet due, any motion on those formulas is not ripe for decision.

With respect to the BANG formula, as we stated on Tuesday's call, VPX's proposal is not acceptable to Monster and thus it is forced to move to compel. We will contact the Court shortly.

Regards,
Steve

Steven N. Feldman
D: 213.788.4272

From: Michael Kanach <mkanach@grsm.com>
Sent: Thursday, August 29, 2019 5:39:13 PM
To: Steven N. Feldman <sfeldman@hueston.com>
Cc: Sourabh Mishra <smishra@hueston.com>; hheffner@grsm.com <hheffner@grsm.com>; Michael Todisco <mtodisco@hueston.com>; tbranson@grsm.com <tbranson@grsm.com>
Subject: Re: [Monster/VPX] Summary of 8/27 Meet and Confer

Thanks Sourabh,

1. Thanks for confirming we are at an impasse with respect to Reign's formula. Please email the court re the Reign formula. And if you know that Monster will not be producing any other formulas, we should raise that issue at the same time, for the convenience of the court and the parties, and for consistency.

2. With respect to BANG's proprietary formula (for BANG products advertised as having SUPER CREATINE), VPX will agree to produce only the ingredient names (with only a few redactions) with the quantity redacted for all ingredients except for the quantity of caffeine. It is VPX's position that producing the formulas with that list of information and those redactions is sufficient to both protect VPX's interests and provide the discovery necessary to comply with Monster's requests in this case. Please note that VPX will not produce its other formulas for products that are not advertised as having SUPER CREATINE (e.g., Keto coffee). While we believe this information is sufficient, we understand from the meet and confer call that you may disagree. Please let us know if that satisfies Monster's concerns or if you will be contacting the court.

Regards, -MIKE

Sent from my iPhone

On Aug 29, 2019, at 4:58 PM, Steven N. Feldman <sfeldman@hueston.com<mailto:sfeldman@hueston.com>> wrote:

Michael,

Monster will not agree to produce the REIGN formula.

Please let us know if your position on the BANG formula has changed. If not, we will e-mail the Magistrate this evening with our agreed-upon availability.

Regards,
Steve

Steven N. Feldman

HUESTON HENNIGAN LLP

D: 213.788.4272<tel:213.788.4272>
sfeldman@hueston.com<mailto:sfeldman@hueston.com>
Biography<https://urldefense.proofpoint.com/v2/url?u=https-3A www.hueston.com attorney steven-2Dn-2Dfeldman &d=DwMFaQ&c=f_a5GUMXoHxU9qrd_Nsg1PnqS-5caRJn92wWy7kEGQ&r=MYv17hpjO194l35ZNkhBVw&m=IP8INs_CVt98Dpdr0xwdXwiUA3Yspehgk5qOu_BzsII&s=DL_5qr8Jz7n8y8qjcDbMEdGydzQCh7YoG4ZqA6wI7vo&e=>

From: Sourabh Mishra <smishra@hueston.com<mailto:smishra@hueston.com>>
Sent: Tuesday, August 27, 2019 6:23:58 PM
To: Michael Kanach <mkanach@grsm.com<mailto:mkanach@grsm.com>>;
hheffner@grsm.com<mailto:hheffner@grsm.com> <hheffner@grsm.com<mailto:hheffner@grsm.com>>
Cc: Steven N. Feldman <sfeldman@hueston.com<mailto:sfeldman@hueston.com>>; Michael Todisco
<mtodisco@hueston.com<mailto:mtodisco@hueston.com>>
Subject: [Monster/VPX] Summary of 8/27 Meet and Confer

Michael and Holly,

Thank you for the call earlier today. Please find below a summary of today's meet and confer and where the parties left each issue. Happy to discuss further as needed.

BANG Formula

You offered to provide redacted versions of the BANG formula and clarified the redactions would remove the amounts of the ingredients in BANG. We provided our reasoning for why Monster is requesting the entire BANG formula

(including amounts) and why VPX's proposal does not provide complete information relating to the claims and defenses in this litigation. Though you stated that VPX disagrees, you agreed to let us know by Thursday at 5pm PT whether VPX will offer unredacted ingredient amounts for any ingredients in BANG's formula, including creatyl-L-leucine.

If VPX's proposal is not acceptable to Monster, Monster will e-mail the Magistrate with the following dates for a pre-filing conference with the Court: Friday (8/30), Wednesday (9/4), and Thursday (9/5).

REIGN Formula

We reiterated Monster's position that the formula for REIGN is not relevant to this case. You stated your arguments for relevance and that VPX believes that the same disclosure that applies to BANG's formula should also apply to the REIGN formula.

Though Monster disagrees with VPX's position, we will let you know by Thursday at 5pm PT whether Monster will change its position.

ESI Order

You noted that you had sent us an e-mail stating that your e-discovery vendor proposed keeping in certain fields that we had proposed removing. We stated that we were fine keeping those fields in.

I'll send you a separate e-mail on the ESI order. I discovered that there's one outstanding issue that we had raised that you had not directly responded to. Once we agree on that issue, we can get the ESI order on file.

Social Media List

You stated that you will soon send to us the VPX social media list we discussed on the last meet and confer.

Search Terms and Production

The parties discussed search terms and agreed to promptly send a list of objectionable and non-objectable search terms to one another. The parties agreed that they would work quickly to resolve any objections and agree on a rolling production schedule based on the volume of documents.

You stated that your document reviewers are ready to go and that you plan on beginning review soon. We stated that we also plan on beginning review of our search term results as soon as possible.

I will send you our list of objectionable search terms separately.

Sourabh Mishra

HUESTON HENNIGAN LLP

D: 949.356.5536<tel:949.356.5536>

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EXHIBIT C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.:

VITAL PHARMACEUTICALS, INC.,
d/b/a BANG ENERGY, a Florida corporation,

Plaintiff,

v.

MONSTER BEVERAGE CORPORATION, a Delaware corporation, MONSTER ENERGY COMPANY, a Delaware corporation, REIGN BEVERAGE COMPANY, LLC, a Delaware limited liability company, ENERGY BEVERAGES, LLC, a Delaware corporation, CSC CORPORATE DOMAINS, INC., a Delaware corporation, MARKERLY, INC., a California corporation, JENNIFER QUILLEN, an individual, BRETT MARTIN, an individual, CHRISTIN KUBSCH, an individual, CRYSTAL BOWLEY-REAGAN, an individual, SUMMER SHORES, an individual, AMBER N. KILLMON, an individual, AMANDA LIGHT, an individual, CRYSTAL CARDER, an individual, LAURA DAWSON, an individual, ARIANNA JONAE HENDERSON, an individual, KRISTIN WONG, an individual, JOHN DOES 1 – 200, JANE AND JOHN DOE INFLUENCERS 1 – 200, and ABC CORPORATIONS 1 – 100,

Defendants.

/

COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF

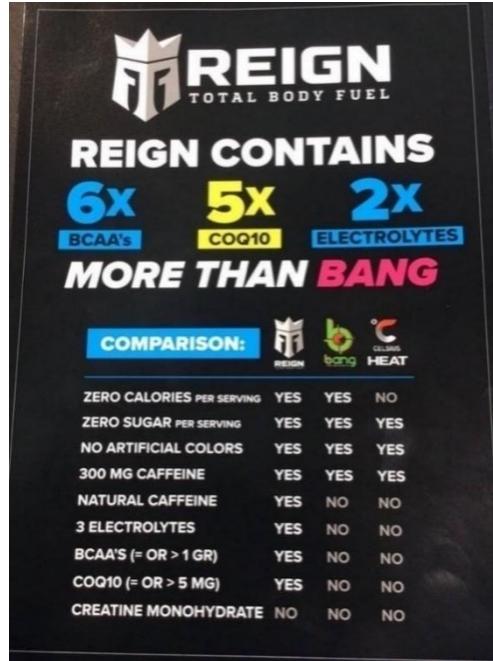
Plaintiff Vital Pharmaceuticals, Inc., d/b/a Bang Energy (“Bang Energy” or “Plaintiff”), hereby sues Defendants Monster Beverage Corporation, Monster Energy Company, Reign Beverage Company, LLC, and Energy Beverages, LLC (collectively “Monster” or the “Monster Defendants”), CSC Corporate Domains, Inc. (“CSC”), Markerly, Inc. (“Markerly”), Jennifer Quillen (“Quillen”), Brett Martin (“Martin”), Christin Kubsch (“Kubsch”), Crystal Bowley-

IX. MONSTER AND ITS DISTRIBUTORS LAUNCH AN INITIATIVE TO INTERFERE WITH SALES OF BANG® AT RETAIL LOCATIONS BY PLACING CARDS WITH FALSE CLAIMS ABOUT BANG® ON STORE SHELVES

142. On or about May 1, 2019, upon information and belief, Monster, its distributors, and other representatives began systematically placing cards on retail store shelves across the country, which included references to the TAB website and its false, defamatory, and disparaging claims about Bang Energy, its CEO, and the BANG® products. Upon information and belief, Monster has directed its distribution network with Coca-Cola to place these cards on shelves containing BANG® during their visits to stock its competing Reign product. Examples of these cards include:



143. Upon information and belief, Monster, its distributors, and other representatives have also placed Reign advertising cards on retail store shelves that contain false or misleading head-to-head comparisons between BANG® and Monster's new Reign products. As an example:



144. These cards comparing Reign and BANG® are false and/or misleading for at least three reasons: (1) Monster claims that Reign contains 5 mg or more of CoQ10, but Bang Energy's testing of Reign products did not detect any CoQ10, while BANG® contains 5.68 ppm (or 2.7mg); (2) Monster claims that Reign has 3 electrolytes and that BANG® does not, but BANG® in fact has 6 electrolytes, or double the number of electrolytes than does Monster's Reign, and (3) Monster states information which switches back and forth from amounts per serving to amounts per can, whenever its suits Monster's false narrative (e.g. claiming zero calories and zero sugar per serving (but not per can), but claiming "2x electrolytes" and not disclosing that it is per can and not per serving). Specifically, Bang Energy's testing reflects the following:

CoQ10

Reign's claimed CoQ10 ingredient was **NOT DETECTED**, while BANG® contains **5.68 ppm**.

Product Name	Lot#	Results on CoQ10
Bang Energy Rainbow Unicorn	102219MD	5.68 ppm
Reign Energy Carnival Candy	B1921N2	N.D. <1.0 ppm
Reign Energy Sour Apple	B1909NCS	N.D. <1.0 ppm
Reign Energy Lemon HDZ	B1933NC5	N.D. <1.0 ppm
Reign Energy Razzle Berry	C1911N2	N.D. <1.0 ppm

Electrolytes

Reign contains only **3** electrolytes, while BANG® contains **6** electrolytes. Reign contains **more sodium**, while BANG® contains **more potassium**.

Electrolyte	Reign	BANG®
	Quantity (per serving)	Quantity (per serving)
Sodium	100 mg	40 mg
Potassium	35 mg	85 mg
Magnesium	Unknown	2% DV (from Magnesium Chloride)
Calcium	No	Yes (Calcium Chloride)
Chloride	No	Yes (Magnesium Chloride and Calcium Chloride)
Phosphate	No	Yes (Potassium Phosphate Dibasic)

145. These TAB and Reign head-to-head comparison cards were and continue to be placed in front of or near BANG® products and, upon information and belief, cans of BANG® are being turned around and/or blocked by the cards such that the BANG® products and the BANG® name and logo are no longer visible to customers, thereby increasing sales of Reign at the expense of Bang Energy. For example, on May 30, 2019, the following image was captured at a retail store in Santa Clara, California:



146. In another egregious example of interference, on June 14, 2019, in a store in Utah, a representative of Bang Energy discovered the following placement of Reign advertisements directly in front of BANG® cans to divert customers to Reign products placed on the shelf immediately above:



147. These acts of interference by Monster and its representatives are deliberately designed to cause, have caused, and unless enjoined will continue to cause, lost sales of BANG®

EXHIBIT D

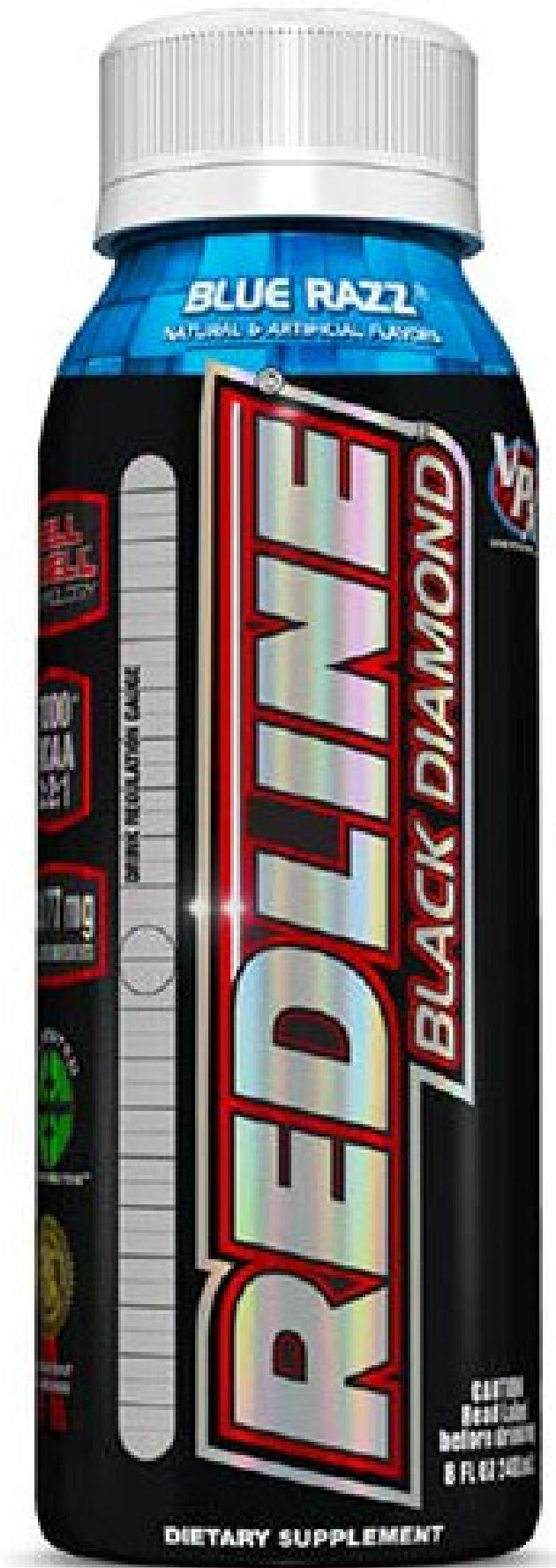
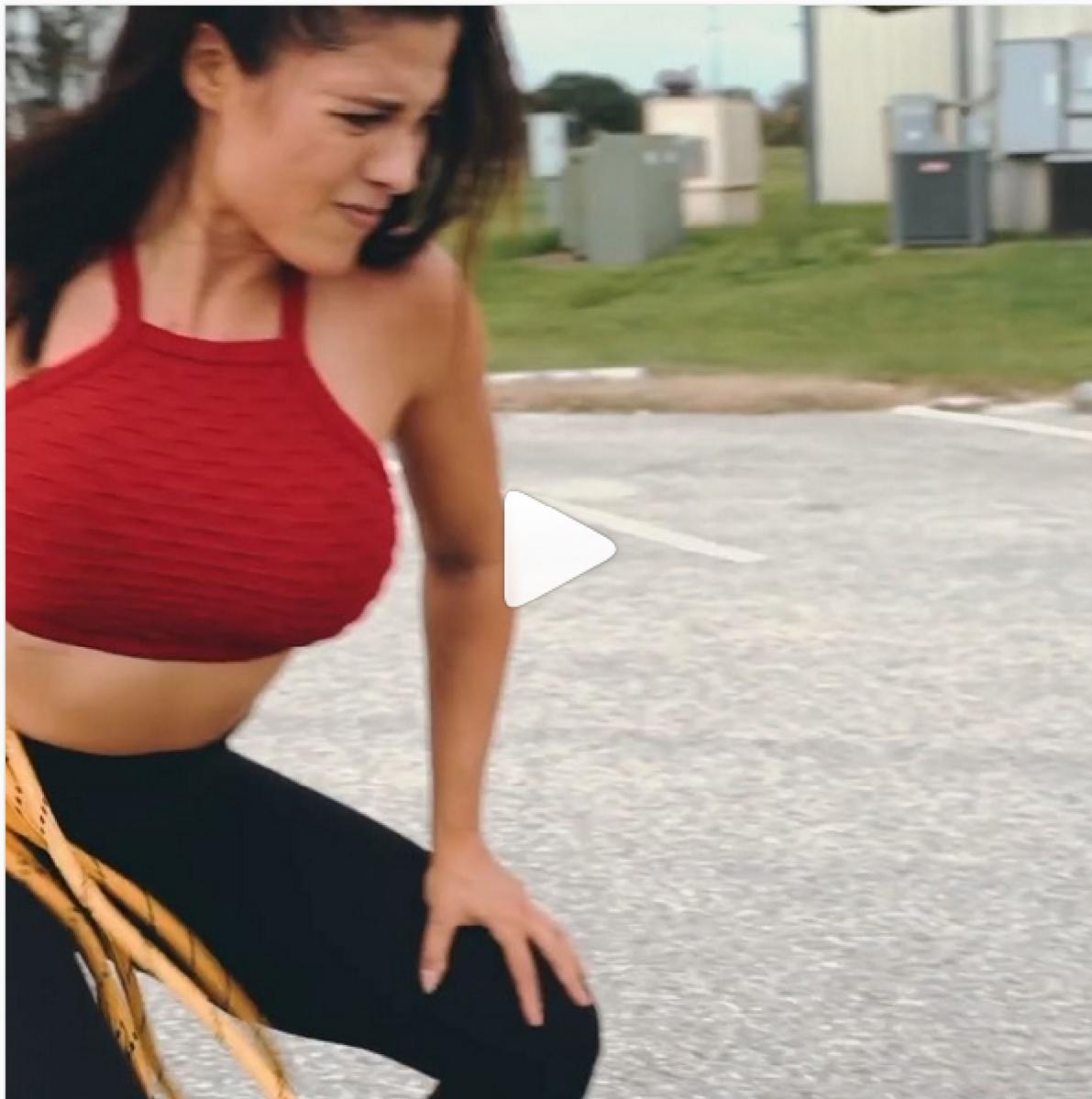




EXHIBIT E



bangenergy.ceo  • Follow

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bangenergy.ceo  Bang Master Blaster contains 6 grams of citrulline malate which contributes to nitric oxide production for better muscle pumps, improved athletic performance, and greater muscle growth. Bang Master Blaster also contains 7.5 grams of BCAAs, 5 grams of Creatine, 2.5 grams of betaine, 2.4 grams of Beta Alanine, 350 mg of Caffeine, and Super Creatine.

88w



rb_hartleyy BANGISLIFE

88w 1 like Reply



5,035 views

DECEMBER 27, 2017

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